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In The

Supreme Court of the United States

October Term, 1989

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

vs.

LOUIS W. SULLIVAN, M.D., IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner South Carolina Department of Social Services (DSS) respectfully replies to the Brief for the Respondent Secretary Sullivan (Secretary), et al. in Opposition as follows:

ARGUMENT

I.

THE SECRETARY'S APPLICATION OF 42 U.S.C. § 655(a)(2)(C) IS CLEARLY NOT REASONABLE

The Secretary's application of section 655(a)(2)(C) to DSS through 45 C.F.R. § 304.50 is unreasonable because it conflicts with the plain meaning of § 655(a)(2)(C) and 31 U.S.C. § 6503(a) and substantial legislative history discussed in DSS's Petition and additional history set forth below. Although the Secretary contends in his Brief in Opposition that the interest money is "income resulting from [child support enforcement] services" because the collections on which the interest is earned are authorized by federal law, this argument clearly overlooks that nothing in the federal requirements for the child support enforcement services directs the states to invest child support collections. Had South Carolina not undertaken to earn interest on the money, the parties would not be in court now. Had Congress intended for such interest to be reached, it could have specified in § 655(a)(2)(C) that interest would be offset as the Secretary did in 42 C.F.R. § 304.50.

Respondents also contend that the words "other income" in section 655 have no reasonable content unless applied to interest, but the Secretary overlooks substantial additional legislative history concerning "cost in excess of . . . fee" provisions now codified under 42 U.S.C. § 654(6)(E). The Secretary points to the fact that provisions for non-AFDC costs in excess of fees, which would constitute income other than fees, were enacted in

1982, a year after section 655(a)(2)(C) was added; however, section 654, as originally enacted in 1974, contained the costs in excess of fees provisions (PL 93-647, Part B, § 101(a), 88 STAT. 2337), and these provisions were retroactively returned to federal law effective August 1981 by the 1982 legislation, PL 97-248 § 171, 96 STAT. 401; *see also* Senate Report, *U.S. Code of Congressional and Administrative News*, 97th Congress, 2nd Session, Vol. 2 at 790 and 830. Even in 1981, when the costs in excess of fees provision was deleted, a 10% fee was substituted which was intended to be a means for recovering costs of the states. *See Senate Report, supra,* 97th Congress, Vol. 2 at 830. Congress has also subsequently treated other fees as income as in the version of § 654(6)(B) enacted in 1984 by PL 98-378 § 3(c) (98 STAT. 1310) which provides for the treatment of an application fee as "income." Therefore, Congress clearly contemplated other sources of "income" at the time it passed section 655(a)(2)(C).

The Secretary also errs in relying upon the codification of section 655(a)(2)(C). As discussed in the Petition herein, when section 655(a)(2)(C) was enacted as a part of § 2333 of PL 97-35, (95 STAT. 862 and 863), the title to § 2333 referred only to "cost of collection and other services for non-AFDC families", and all other parts of that section, of which section 655(a)(2)(C) was a part, referred to non-AFDC matters. Although section 2333(c) was recodified as section 655(a)(2)(C) by section 171 of PL 97-248, 96 STAT. 401, section 171 also applied only to non-AFDC matters, and indicated no intent whatsoever to broaden the reach of section 2333(c). Moreover, as noted in the Petition, codification cannot change the effect of laws unless such intent is clearly expressed.

Finley v. U.S., ___ U.S. ___, 104 L.Ed.2d 593, 109 S.Ct. [Interim Ed] 2003 (1989). No such intent was expressed here because the codification provision was in the non-AFDC provision of 1982 legislation just as § 655(a)(2)(C) was first enacted in non-AFDC provisions in 1981.

The Secretary misconstrues DSS's argument concerning the Intergovernmental Cooperation Act, 31 U.S.C. § 6503(a). He erroneously states that the federal government does not control the transfer of child support collections so as to "maximize the interest earnings on those funds." Section 6503(a) says nothing about maximizing federal interest earnings on grant funds. Instead, it states that federal agencies shall transfer grant money " . . . to *minimize* the time elapsing between transfer of the money from the Treasury and the disbursement by a state. . . . " (emphasis added). The federal government can, of course, through regulation affect the time of the disbursement of the child support collections, and it already provides for how the collections shall be utilized as replacements for AFDC grant funds. 45 C.F.R. §§ 232.20(c) and 302.51(b)(2) and (4). Clearly, the collections function as grants under § 6503(a), and as such under that statute, the interest earned is not subject to offset.[1]

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[1] The Secretary erroneously indicates that § 6503(a) may not be properly before the Court, an issue that he did not raise in his Answer to the Complaint in the District Court (Record below, 19). DSS did not specify that statute before the Grant Appeals Board but it was not required to do so in that DSS clearly raised the issue that § 304.50 was in excess of statutory authority (Record below, 117). Section 6503(a) supports that argument that section 304.50 is in excess of authority, and section 6503(a) was addressed by both the District Court and the Court of Appeals. (App. to Petition, 3a and 14a-17a).

II.

SECTION 304.50 SHOULD NOT BE APPLIED RETROACTIVELY

The Secretary errs in construing section 304.50 as being interpretive. That this regulation went through the notice and comment requirements of the Administrative Procedure Act indicates that it is legislative because typically that procedure is reserved for legislative or substantive rules, and interpretive or clarifying rules may be adopted without notice and comment. *See* 5 U.S.C.A. § 553(b)(3)(A); *U.S. v. Shelton Coal Corp.*, 829 F.2d 1336 (4th Cir. 1987). In addition, that this regulation is legislative rather than interpretive is further supported by the fact that the term "interest" is expressly added by the regulation to the statutory language of section 655(a)(2)(C). Section 655 provides for the exclusion of " . . . fees collected or other income resulting from services provided. . . . " Section 304.50 provides for the exclusion of "fees . . . *interest* and other income. . . . " (emphasis added).

Although DSS noted in its earlier brief that only the second of three federal audits mentioned the interest on collections issue and that the third audit's failure to mention it gave DSS reason to believe that the Secretary was no longer seeking the interest money, the Secretary erroneously contends that the third audit report did reference the collection actions noted in the second audit. (Brief of Respondents, p. 10, n. 12). Instead, the third audit referred to matters in the second audit report other than the interest problem in that report. (Record below, p. 54). The Secretary also states that the failure of audits to address the matter of interest does not indicate a federal

standard authorizing states to keep the interest; however, under federal regulations, the audits are supposed to be complete and comprehensive as to the conformity of the operation of state programs with federal requirements. 42 U.S.C. § 652(a)(4) and 45 C.F.R. §§ 305.10 and 305.36. Therefore, DSS was justified in relying upon the audits.

The Secretary also referred to the Action Transmittal that required states to deduct the interest and which was received by DSS on October 20, 1982 (Record below 54). The Action Transmittal lacks the force and effect of law because it was not a regulation adopted pursuant to the Administrative Procedures Act, 5 U.S.C. § 553. *Texaco, Inc. v. Federal Power Comm.*, 412 F.2d 740 (3rd Cir. 1965). Moreover, even if, *arguendo*, the Action Transmittal 82-8 had the force and effect of law, it would not allow the recovery of interest prior to October 20, 1982.

The Secretary erroneously contends here that the executive branch would be required to pay funds out of the Treasury "were credit for the interest not forthcoming." (Brief of Respondent at p. 11) This argument overlooks that the claims of DSS for reimbursements under the Child Support Enforcement Program have already been made for the years in question and no additional monies would be forthcoming from the Treasury for those periods if the Court were to rule with DSS here. Instead, DSS would be the entity that would have to repay money which would require the transfer of over $777,000.00 to the United States Government. Although as noted in DSS's Petition, counsel for DSS is informed that DSS now has some funds available for at least partial payment of the interest in question (Petition at 21), DSS did not have such funds at the time the issues of retroactivity were

addressed in the District Court and DSS would not have this money set aside now had the District Court not granted stays. Although the Secretary refers to the District Court's opinion stating that the balance of the harm does not preponderate for or against any party, the District Court later found differently when it granted DSS a stay on appeal on the basis of losses to DSS. (App. Ex. E, p. 21A). Moreover, the Secretary surely cannot say that DSS's reliance was not detrimental as to the prior audits and other factors which indicated to DSS that section 304.50 was not retroactive. DSS would now be the agency that would lose hundreds of thousands of dollars six years after the 1981-84 period to which the Secretary erroneously tries to apply section 304.50 retroactively.

CONCLUSION

The South Carolina Department of Social Services respectfully submits that its Petition for Writ of Certiorari should be granted in that section 304.50 and the actions of the Secretary clearly exceed the intent of Congress under 42 U.S.C. § 655 and 31 U.S.C. § 6503.

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